Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EAST DAYTON TOOL AND DIE COMPANY, *et al.*,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORP.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

CHARLES J. FARUKI *
PAUL L. HORSTMAN
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
(513) 227-3705
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the 80% stock ownership regulation of the Pension Benefit Guaranty Corporation for determining trades or business under common control for the purposes of assessing liability for underfunded pension benefits of terminated pension plans for the purposes of Title IV of the Employee Retirement Income Security Act ("ERISA") applied where (a) the stock of the corporate plan sponsor was held by an escrow agent to secure payment of a promissory note representing the balance owed by the corporate plan sponsor for redemption of stock and (b) prior to the date of plan termination, as a result of a default under the escrow agreement, the rights of stock ownership reverted to the secured payee who exercised those rights to take control of the plan sponsor and divest Appellees from all measure of control and ownership over both the pension plan and the operations of the plan sponsor?

2. Whether the Court of Appeals for the Sixth Circuit erred in applying the 80% ownership regulation to impose liability on Appellees for underfunded pension benefit liabilities on the basis of Appellees' ownership and control over the plan sponsor for a 2½-year period prior to the date of plan termination, regardless of Appellees' lack of ownership and control over the plan sponsor on the date of pension plan termination?

THE PARTIES

Petitioners are East Dayton Tool & Die Company ("East Dayton"), the pension plan sponsor, Roscommon Financial Corporation ("Roscommon Financial"), Dayton Casting Company, Inc. ("Dayton Casting"),* Advance Foundry Company, Inc. ("Advance") and Roscommon Realty Company ("Roscommon Realty"), a real estate partnership, and the individual partners of Roscommon Realty, Paul H. Granzow ("Granzow"), Charles F. Sherman ("Sherman") and Robert M. Tormey ("Tormey"). The Respondent is the Pension Benefit Guaranty Corporation.

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* Dayton Casting owns as a subsidiary Richman Casting Company, which is not a party to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Magistrate Judge issued two memoranda and recommendations granting the motion for judgment on the pleadings of East Dayton, Roscommon Financial, Dayton Casting, Advance Foundry and Roscommon Realty and the motion to dismiss of Petitioners Granzow, Sherman and Tormey. The decisions of the Magistrate Judge are, for the convenience of the Court, set forth in the Appendix at 12a-30a and 44a-47a. Also, the district court's Memorandum and Order adopting the Magistrate's recommendation is at 31a-43a of the Appendix.

The Opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 24, 1994 ("Opinion"), is at 1a-11a of the Appendix. On appeal the deci-

sion of the district court was reversed and the case was remanded for further proceedings.

JURISDICTIONAL STATEMENT

The judgment in the United States Court of Appeals for the Sixth Circuit was entered on January 24, 1994. Petitioners East Dayton, Roscommon Financial, Dayton Casting, Advance Foundry, Roscommon Realty, Granzow, Sherman and Tormey timely filed a Motion for Rehearing and Suggestion of Rehearing En Banc. On March 9, 1994, the Petitioners' motion for rehearing was denied and the mandate was issued by the Court of Appeals for the Sixth Circuit. Appendix at 48a. The Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 29 U.S.C. § 1368(d).

STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of several provisions of ERISA, 29 U.S.C. §§ 1301-1382 (1976), relating to the pension plan termination insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC"). The sections at issue, §§ 1301(b) and 1362 of Title 29 U.S.C., are set forth at 49a-55a of the Appendix.[1]

STATEMENT OF THE CASE

A. Introduction

This lawsuit was commenced by the Pension Benefit Guaranty Corporation ("PBGC") to collect an alleged liability for pension plan underfunding of the East Dayton

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[1] ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, Title XI, 100 Stat. 237 (1986) ("SEPPAA") and again by the Pension Protection Act of 1987, Pub. L. No. 100-206, Title IX, subtitle (D), Part II, 101 Stat. 1330-33 (1987) ("PPA"). Neither SEPPAA nor PPA apply to the instant case. Therefore, unless otherwise stated, the citations in the petition are to 29 U.S.C. §§ 1301-1382 (1976).

pension plan on the basis that the Appellees—which include brother/sister entities and individual owners of those entities—were members of a "controlled group" that made them employers who maintained an underfunded pension plan covered by the pension plan termination insurance program established by Title IV of ERISA and administered by the PBGC.

Petitioner East Dayton was the plan sponsor. Petitioners Roscommon Financial, Roscommon Realty, Advance Foundry and Dayton Casting are claimed to be members of the "controlled group" as a result of Roscommon Financial's alleged ownership of 100% of the stock of East Dayton. The Individual Petitioners Granzow, Sherman and Tormey are partners of Petitioner Roscommon Realty, a general partnership, who are claimed to be liable for the obligations of the partnership. All the stock of East Dayton had been placed in escrow and pledged to secure a $1,200,000 debt owed by East Dayton to Dorothy Darrow ("Darrow") for the redemption of all the shares of East Dayton owned by Darrow.

The Magistrate, relying on the reasoning of *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) (*"Challenge Stamping"*), recognized that once East Dayton defaulted, the loan documents effectively transferred control to the secured creditor, Dorothy Darrow, prior to the termination date, so that the Roscommon Group [2] was not an employer controlling East Dayton on the plan's termination date and therefore was not liable for East Dayton's underfunded benefit liabilities. The district court adopted the Magistrate's recommendation and entered judgment for the Petitioners.

The Court of Appeals for the Sixth Circuit reversed and remanded, reasoning that *Challenge Stamping* did not

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[2] Roscommon Financial, Roscommon Realty, East Dayton, Dayton Casting, Advance Foundry and Individual Petitioners are collectively referred to as Roscommon Group.

control because Roscommon Financial actually controlled East Dayton and its plan for 2½ years prior to the January 26, 1976 default by Roscommon Financial on Darrow's loan, regardless of Appellees' lack of ownership and control over the pension plan on the May 15, 1976 plan termination date. Appendix at 3a and 8a-9a. Because *Appellees lacked all indicia of ownership and control over the plan sponsor on the* May 15, 1976, *plan termination date,* Appellees assert that they cannot be liable under 29 U.S.C. § 1362 because liability is predictated upon ownership and control at the time the plan was terminated, not upon ownership and control during a period of time prior to the termination date.

The Administrative Record before the PBGC appeals board showed the following undisputed facts: East Dayton is an Ohio corporation formed September 21, 1928. R. 17; A.R. 1020.[3] East Dayton was engaged in the manufacture, design and sale of tools and dies for the industry. Mrs. Dorothy Darrow ("Darrow"), the daughter of the founder William Schulman, eventually inherited all of the stock in East Dayton and held 100% of the stock until the initial sale of the stock on August 23, 1973. R. 17; A.R. 1020.

East Dayton had established a qualified retirement plan for its salaried employees on January 1, 1959. The East Dayton Tool & Die Company retirement plan for salaried employees ("East Dayton Plan" or "Plan") was funded through a trust with the Third National Bank & Trust Company of Dayton, Ohio ("Third National").

On August 23, 1973, Darrow sold common shares of East Dayton to Granzow, Sherman, Tormey and Clifton C. Hawkins, Jr. ("Hawkins") for an aggregate sum of $150,000. Granzow, Sherman and Tormey each held

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[3] Citations to the District Court's Docket and the Administrative Record will be cited first to the Court's Docket ("R. ——") and then to the Administrative Record ("A.R. ——").

8.42 shares and Hawkins held 2.08 shares. R. 17; A.R. 829.

On August 28, 1973, East Dayton redeemed the balance of Darrow's East Dayton stock consisting of 238.6 common shares and 748 preferred shares for $1,350,000. Darrow received $150,000 cash at the closing and the remaining $1,200,000 under a promissory note from East Dayton. R. 17; A.R. 1082. At the closing of the sale, the parties executed an agreement for sale of all the stock of Dorothy Darrow ("Redemption Agreement"), a $1,200,000 promissory note and an escrow agreement. R. 17; A.R. 1025, 1031. As a result of the transaction, Granzow, Sherman, Tormey and Hawkins became the record shareholders of East Dayton. R. 17; A.R. 830.

Under the terms of the note, the principal amount was secured by, among other things, the pledge of all the common stock of East Dayton, including the common stock held by Granzow, Sherman, Tormey and Hawkins. R. 17; A.R. 1086. The shares were pledged to Darrow and escrowed with the escrow agent, Third National, which held the stock certificates together with an assignment, separate from the certificates, evidencing the ownership of the shares executed in blank by the individual shareholders. R. 17; A.R. 1026. The Escrow Agreement provided:

> "2. So long as Company [East Dayton] shall well and truly pay the promissory note according to its terms and tenor, the said stock certificates shall be held by the Escrow Agent, and Shareholders shall continue to have all the rights of ownership, except possession and transfer rights. At such time as the said promissory note has been fully paid, the executed assignment form and related certificates shall be redelivered to Shareholders and this Escrow Agreement shall be void and of no further force and effect.
>
> "3. Upon written notice given to Escrow Agent by Darrow of a default in the payment of any install-

> ment of interest or principal due according to the terms of said promissory note, then Escrow Agent shall either (i) cause the shares to be sold as hereinafter set forth, or (ii) shall cause the immediate election to the Board of Directors of the Company, of not less than two persons chosen by Darrow or her executors or assigns; said directors to continue in office until the Company cures the default, or, in the event the default cannot be cured in the opinion of the two directors, then Escrow Agent shall [sell the stock] . . . ."

R. 17; A.R. 1088-89.

Roscommon Financial was incorporated on March 22, 1973, with Granzow, Sherman and Tormey each owning 33⅓ percent of the stock. They were elected directors on January 22, 1974. R. 17; A.R. 830.

Granzow, Sherman and Tormey each owned 33⅓ percent of Roscommon Realty, a real estate partnership. On February 8, 1974, Granzow, Sherman and Tormey transferred their East Dayton common stock to Roscommon Financial. R. 17; A.R. 870. Shortly thereafter, Roscommon Financial acquired Hawkins' stock and became East Dayton's sole shareholder.

Between August, 1973, and December, 1975, East Dayton's business continued to decline. Attempts to secure additional financing were futile. R. 17; A.R. 1030. Finally, on January 26, 1976, Roscommon Financial defaulted on Darrow's loan. R. 17; A.R. 1031. Darrow refused to consent to a loan which would have allowed Roscommon Financial to continue in business, and instead, pursuant to the options provided in the loan documents, at a February 6, 1976 meeting, appointed two directors to East Dayton's board. R. 17; A.R. 1030-32. On February 7, 1976, the newly elected East Dayton board (under Darrow's control) decided to liquidate East Dayton and to repay Darrow with the proceeds. The Individual Appellees did not approve of or participate in

the decision to liquidate. R. 17; A.R. 1034. At that time since Darrow had beneficial ownership of the stock, Granzow offered to effect the formal transfer of East Dayton's shares from the Escrow Agent to Darrow, but Mrs. Darrow refused to accept the stock. R. 17; A.R. 1034.

The Court of Appeals' opinion erroneously states that the parties agreed that on the plan termination date, May 15, 1976, Roscommon owned 100% of East Dayton stock. Appendix at 3a-4a. On the contrary, Roscommon Financial asserted before the PBGC's appeals board that (a) it lost all indicia of ownership in East Dayton stock as a result of the February 6, 1976, default, (b) the effects of the default and the February 6, 1976, meeting electing directors selected by Darrow were that (1) the shareholders' ability to vote the stock and make decisions regarding management or liquidation were transferred from Roscommon Financial, Sherman, Tormey and Granzow to Darrow, (2) the shareholders' right to participate in the proceeds of the liquidation were subordinate to the interests of Third National and Darrow, (3) the shareholders' right to elect directors were relinquished to Darrow, (4) the default provisions of the escrow agreement were exercised by Darrow, (5) the beneficial interest in the stock was transferred to and exercised by Darrow, (6) Third National continued to hold the stock as Escrow Agent for the use and benefit of Darrow, (7) Roscommon Financial retained mere record title to the stock on the books and records of East Dayton for the use and benefit of Darrow. R. 17; A.R. 1035.

On or about March 31, 1976, East Dayton ceased all active plant operations. R. 17; A.R. 831. On April 25, 1976, East Dayton (controlled by Darrow) sent the PBGC a notice of intent to terminate the Plan. On May 3, 1976, a special meeting of the directors of East Dayton was held, at which meeting the directors (all subject to Mrs. Darrow's control) voted to terminate the Plan. R.

17; A.R. 1211. East Dayton's plan was officially terminated by the PBGC on May 15, 1976. R. 17; A.R. 1232.

The PBGC notified East Dayton its plan assets were insufficient by $326,362 to satisfy the benefits guaranteed by ERISA under Title IV. The PBGC determined that East Dayton, Roscommon Financial, Dayton Casting, Advance Foundry, Roscommon Realty and two other entities (they were found not liable by the PBGC) were members of the same control group as defined by 29 U.S.C. § 1301(b) and therefore were jointly liable for the amount of $326,362. R. 17; A.R. 811-13.

On May 6, 1981, the Roscommon Group appealed the PBGC's initial liability determination to the PBGC's Appeals Board. On appeal, the Roscommon Group argued that they were not a control group for liability purposes because Roscommon did not control East Dayton on the plan termination date and had lost all indicia of ownership prior to the plan termination date. The Roscommon Group noted that the loan documents upon default divested them of all authority and vested control in Darrow.

On April 28, 1982, the Appeals Board issued the agency's final determination, finding that Roscommon Group was a member of a commonly controlled group on the plan termination date under § 4001(b) of ERISA. As such, the PBGC found that the Roscommon Group qualified as an "employer" which maintained the Plan and was liable for the guaranteed benefits. Thus, the PBGC sought to impose liability on the Roscommon Group regardless of the fact that the Roscommon Group lost all indicia of ownership in East Dayton stock as a result of the default under the loan documents effective February 6, 1976, several months prior to the May 15, 1976 plan termination date.

B. Procedural History of the Case and Jurisdictional Statement

Respondent, on May 13, 1982, sought enforcement of the agency's determination in the United States District Court for the Southern District of Ohio. On June 22, 1982, the Roscommon Group filed an Answer, Counterclaim and Motion for Judgment on the Pleadings. Simultaneously, the Individual Petitioners filed a motion to dismiss the PBGC's complaint.

On January 23, 1985, the district court referred the case to the Magistrate. The Magistrate, relying on the reasoning of *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) (*"Challenge Stamping"*), concluded that (a) once Roscommon Financial defaulted, the loan documents effectively transferred control to Darrow prior to the plan termination date and (b) the Roscommon Group was not the employer controlling East Dayton on the Plan's termination date, and, therefore, was not liable for East Dayton's underfunded pension benefit liabilities. The district court adopted the Magistrate's recommendation and entered judgment for the Appellees, stating in part:

> "The allegation that [*Challenge Stamping*] applies only in bankruptcy contexts is without merit. In [*Challenge Stamping*], the Sixth Circuit did not limit its pronouncement to bankruptcy scenarios. Rather, the [*Challenge Stamping*] court looked to the totality of the circumstances surrounding corporate operations and actual control over the owned company or over the pension plan to determine whether or not the 80% stock ownership rule accurately defined the party with a controlling interest. In this Court's opinion, the means by which corporate control is lost is not relevant. Regardless of the means that effectuate the loss of control, the same result is achieved—the loss of control over company operations and the pension plan. Thus, whether a com-

pany is stripped of its control by a bankruptcy court or by a secured creditor, as in this case, is insignificant; it is a distinction without a difference."

The Sixth Circuit Opinion is dated January 24, 1994. In that Opinion the Sixth Circuit disagreed with the District Court's conclusion that *Challenge Stamping* controls the instant case. The Sixth Circuit stated that in *Challenge Stamping* the stock purchaser never had actual control over the company involved or its pension plan, whereas, in contrast, Roscommon Financial actually controlled East Dayton as planned for 2½ years prior to the January 26, 1976, default on Darrow's loan. Appendix at 2a, 8a-9a. The Sixth Circuit reasoned that because the Roscommon Group controlled East Dayton and its Plan for over 2½ years, *Challenge Stamping*'s reasoning is not applicable and that the district court erred in not applying ERISA's 80% control test. Appendix at 8a-9a.

REASONS FOR GRANTING THE PETITION

The Roscommon Group would raise two arguments on appeal. The first issue is whether the 80% ownership regulation applies to the Roscommon Group where Roscommon Financial, the alleged owner of East Dayton stock, lost all indicia of ownership and control over the affairs of East Dayton *prior to the plan termination date* as a result of a default on the loan documents which passed ownership rights and control to the secured creditor Dorothy Darrow. The second issue is whether the Sixth Circuit erred by fixing responsibility for pension plan underfunding on the basis of Roscommon Financial's ownership and control of East Dayton for 2½ years prior to the January 26, 1976, default, regardless of Roscommon Financial's loss of ownership and control to Mrs. Darrow on February 6, 1976, several months prior to the plan termination date. Petitioners other than East Dayton were held liable regardless of the fact that they did not participate in the decisions made by Darrow after February 6, 1976 to liquidate East Dayton and to terminate the Plan.

Certiorari should be granted on these issues because the application of the 80% ownership regulation and the provisions of 29 U.S.C. § 1362, which imposes liability on any employer who maintained a plan (other than a multiemployer plan) "at the time it was terminated," present important federal questions of concern to all persons maintaining pension plans subject to the pension benefit guaranty program operated by the PBGC. Although this case involves the 1976 versions of §§ 1301(b) and 1362 of Title 29 U.S.C., the same definition of "controlled group" was retained by the 1986 amendment to § 1301. That definition is in the current version of § 1301(a)(14). Moreover, the requirement in the prior version of § 1362 that liability applies to employers who maintained a plan "at the time it was terminated" was retained in the current (1986) version of § 1362, which imposes liability on any person who is a member of a controlled group "on the [plan] termination date." Thus, the issues raised in the petition directly affect all persons maintaining or having an ownership interest in an entity maintaining a plan subject to the current (1986) version of §§ 1301 and 1362 of Title 29 U.S.C.

This Court should fashion a clear rule of law on whether liability for underfunding of a pension plan at the termination date for the plan can be predicated upon ownership of or control over a plan sponsor during a period prior to the plan termination date, where the parties sought to be held liable lacked all indicia of ownership and control over the plan and the plan sponsor on the date of plan termination. Moreover, this Court should fashion a clear rule whether, for the purposes of the application of the PBGC's 80% ownership regulation to determine members of the controlled group, ownership exists where all indicia of ownership is lost to a secured creditor prior to the plan termination date. As previously shown, these issues continue to be important federal questions under the current 1986 revisions to § 1301 and § 1362, 29 U.S.C.

Unless clear rules of law are stated by this Court, there will be continued uncertainty as to (a) whether ownership for purpose of determining members of a controlled group can be based on bare record title where stock voting rights and the value of the stock were transferred to a secured creditor who terminates the plan, and (b) whether liability for terminated single-employer plans can be based upon ownership and control prior to the plan termination date rather than ownership and control on the date of plan termination.

I. THE ROSCOMMON GROUP IS NOT LIABLE UNDER ERISA BECAUSE ROSCOMMON FINANCIAL LACKED ALL INDICIA OF OWNERSHIP AND CONTROL OVER THE PLAN SPONSOR, EAST DAYTON, ON THE DATE OF PLAN TERMINATION

For the purposes of defining trades or businesses under "common control" under 29 U.S.C. § 1301(b), the PBGC 80% ownership regulation defined "common control" as an ownership interest of 80% of the total combined voting classes or of the total value of all shares of all classes of stock connecting a group of trades or businesses. 26 C.F.R. §11.414(c)-(2)(f)(1). The regulation does not define "ownership". Moreover, the Court of Appeals for the Sixth Circuit in its opinion did not define ownership. Rather, the court (Appendix at 9a) erroneously stated that "[t]he parties agreed on the termination date Roscommon Financial owned: (1) 100% of East Dayton stock. . . . Additionally, because the ownership exceeds 80% of the total value of stock in each business, it qualified as 'controlling' interest under ERISA." Both the statement regarding the parties' alleged agreement on Roscommon's ownership of East Dayton and the statement regarding 80% ownership of the total value of East Dayton stock are erroneous.

The parties did not agree that on the termination date Roscommon Financial owned 100% of the stock of East Dayton. Rather, Petitioners contended before the PBGC,

and, after being denied an evidentiary hearing, submitted uncontroverted affidavits showing, that prior to the plan termination date (a) "beneficial ownership of [East Dayton] stock had been transferred to the previous owner [Darrow]," (b) "Appellants lost all of the voting power and indicia of ownership associated with the East Dayton stock," and (c) "the East Dayton stock was valueless." Joint Appendix, Vol. IV, 0769 at 0791; R. 933 at 955.[4] Moreover, the Magistrate found, upon review of the Administrative Record, that "[t]he breach of the Escrow Agreement resulted in a total loss of their [Petitioners'] ownership rights in the East Dayton stock." Joint Appendix Vol. I, 0234 at 0248 (July 5, 1985 Report and Recommendation). Thus the Court's statement that the parties agreed that Roscommon Financial owned 100% of East Dayton stock is factually incorrect. For this reason alone, the writ of certiorari should be granted to vacate the Sixth Circuit Opinion.

Moreover, the Administrative Record does not support the finding that Roscommon Financial had ownership of the East Dayton stock on the date of plan termination. After the default under the Escrow Agreement in February, 1976, all indicia of ownership passed to Dorothy Darrow. Ignoring the reality of the events in February, 1976, in which Darrow exercised voting rights over the stock held in escrow for her benefit to take control of the corporation, to terminate East Dayton's pension plan and to liquidate its assets, the PBGC impermissibly determined that Roscommon Financial was the owner of the stock. In fact, Roscommon Financial lacked all indicia of ownership in that it had (a) no right to vote the stock, (b) no right to transfer the stock and (c) no right to sell the stock.

In addition, the Opinion of the Court of Appeals erroneously stated that Roscommon Financial owned in ex-

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[4] This reference is to the Joint Appendix filed in the Court of Appeals for the Sixth Circuit.

cess of 80% of the value of East Dayton stock. Appendix at 9a. The uncontroverted evidence in the Administrative Record (recited in the Court of Appeals' Opinion, Appendix at 3a-5a) was that Darrow took voting control of East Dayton in February, 1976, and used that control to liquidate the company and to receive all the proceeds of the liquidation after payment to creditors. As a result, in February, 1976, 100% of the value of the East Dayton stock was transferred to Dorothy Darrow subject to the claims of creditors of East Dayton. Thus, Roscommon Financial did not possess 80% or more of the total value of the East Dayton stock at the time of the May 1976 plan termination.

Under the 80% ownership regulation, Roscommon Financial had to own either 80% of the voting stock or 80% of the total value of the East Dayton stock on the date of plan termination. 26 C.F.R. § 11.414(c)-(2)(b)(1). Neither condition was met in this case. The Court's opinion recognized that the first condition—80% ownership of voting stock—was not met. As stated in the Court's Opinion (Appendix at 3a), prior to the plan termination date "Darrow had control of the *voting rights* of the [East Dayton] stock." (Emphasis added). Moreover, since at the time of plan termination, 100% of the total value was owned by Darrow as a result of the February, 1976 default, Roscommon Financial did not have ownership over 80% of the total value of the stock on the date of plan termination. Thus, the second condition for controlling interest—ownership of 80% of the total value of the stock on the date of plan termination was also not met. Accordingly, since the Court of Appeals' opinion was based on the erroneous premise that Roscommon Financial owned over 80% of the "total value" of East Dayton stock on the date of plan termination, the petition for writ of certiorari should be granted.

II. THE SIXTH CIRCUIT ERRED IN APPLYING THE 80% OWNERSHIP REGULATION ON THE BASIS OF APPELLEES' OWNERSHIP AND CONTROL OVER THE PLAN SPONSOR FOR A PERIOD OF TIME PRIOR TO THE DATE OF PLAN TERMINATION REGARDLESS OF APPELLEES' LACK OF OWNERSHIP AND CONTROL OVER THE PLAN SPONSOR ON THE DATE OF PLAN TERMINATION

Section 1362 of Title 29 U.S.C. defining employer liability for underfunded pension plans provides that it "applies to any employer who maintains a single employer plan *at the time it was terminated. . . .*" [5] Thus the statute, in clear and unambiguous terms, requires that liability be imposed upon persons who are employers "on the termination date." Employers include persons who are members of the "controlled group", *i.e.*, persons who own 80% or more of the voting stock or the value of the stock of the plan sponsor. However, since liability is based upon the termination date of the plan, any person, like Roscommon Financial, which has lost its stock ownership in the plan sponsor prior to the plan termination date, cannot be held liable as an employer who maintained the plan on the plan termination date.

In *Challenge Stamping*, the Court of Appeals for the Sixth Circuit concluded that "stock did not provide *any* measure of control over [plan sponsor] *at the date of termination*, and thus the [80% ownership] regulation did not apply." 719 F.2d at 151 (second emphasis added). In its opinion, the Court of Appeals for the Sixth Circuit erroneously distinguished *Challenge Stamping* from this case on the impermissible basis that the stock purchaser

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[5] The current (1986) version of § 1362 defining employer liability retains the requirement that liability be determined as of the plan's termination date. The current § 1362 provides that "any person who is, *on the termination date*, is . . . a member of such a contributing sponsor's controlled group shall incur liability under this section." (Emphasis added.)

in *Challenge Stamping* never had actual control over the plan sponsor. Appendix at 8a. It found that the regulation applied because Roscommon Group controlled East Dayton and its plan for 2½ years prior to the January, 1976, default under the loan documents with Darrow. In basing liability of the Petitioners upon Roscommon Financial's past ownership of East Dayton stock regardless of its loss of ownership on the date of plan termination, the Sixth Circuit adopted a new rule for liability based on past ownership which directly contravenes the applicable law and regulation which makes ownership and control of the plan sponsor *on the date the plan terminated*, not ownership and control prior to the termination date the criterion for imposing liability for pension plan underfunding. No other court of appeals has so held.

Until the decision by the Court of Appeals for the Sixth Circuit in this case, the criterion for common control over the plan sponsor was ownership on the date of plan termination. Significantly, the PBGC in its decision recognized that the criterion was common control over the plan sponsor on the date of plan termination. Joint Appendix Vol. I at 0054; R. at 1229 (PBGC Appeals Board Decision, April 28, 1982). When ownership of the plan sponsor ends prior to the date of plan termination, no liability can be imposed upon a person as a member of a "controlled group" regardless of the person's past ownership and control over the plan sponsor during a period prior to the date of plan termination.

For example, in *PBGC v. Jeannette Newspapers, Inc.*, 585 F. Supp. 1281, 1283-84 (W.D. Pa. 1984), the court found that the plan termination date was the same date as the sale date and that the sale was conditioned on plan termination. Thus, reasoned the court, neither the seller nor the buyer could be held liable as members of the controlled group because they lacked ownership of the plan sponsor on the date of plan termination. Likewise, in February, 1976, over two months prior to the plan ter-

mination date, Roscommon Financial lost all indicia of ownership of East Dayton stock. The fact that Roscommon Financial may have controlled East Dayton prior to February, 1976, is not relevant since, under the applicable law and regulation, ownership for the purposes of applying the 80% ownership regulation must be determined on the date of plan termination. Since liability under § 4062 of ERISA is limited to any employer who maintained a plan on its termination date, ownership and control over East Dayton during a period prior to the date of plan termination is irrelevant. Since Roscommon Financial did not own 80% of the voting stock or 80% of the value of East Dayton stock on the date of plan termination, it and the other Petitioners (Roscommon Realty, Advance Foundry, Dayton Casting and Individual Petitioners) cannot be members of a controlled group for East Dayton and thus cannot be deemed employers who maintained the East Dayton plan on the date it terminated.

Since the Court of Appeals for the Sixth Circuit in this case applied a new test for determining common control based on control and ownership during the period prior to the date of plan termination and ignored the correct test of liability based upon ownership and control of the plan sponsor on the date of plan termination, the Court of Appeals' Opinion is erroneous as a matter of law and the petition for writ of certiorari for this separate and independent reason must be granted.

CONCLUSION

The petition for writ of certiorari should be granted on both issues. This case raises significant federal questions under Title IV of ERISA regarding the liability of persons having an alleged ownership interest in the sponsor of a terminated plan insured by the PBGC. The first issue is whether a mere identification on the stock registry without any of the rights of stock ownership constitutes

stock ownership. The answer is no because "paper" ownership carried with it none of the indicia of ownership. The second issue is whether membership in a controlled group can be based on stock ownership that ceased prior to the date of Plan termination. If the Court of Appeals' Opinion is allowed to stand, liability will be imposed upon persons who neither owned the plan sponsor on the date of plan termination nor participated or influenced the decision to terminate the plan. Since the 80% ownership regulation continues to apply to persons subject to the current (1986) version of the statute, the issues raised in this petition continue to directly affect persons who maintain or are affiliated with persons who maintain pension plans insured by the PBGC. Thus, a clear rule of law defining the extent to which liability, if any, on the basis of membership in a controlled group of a plan sponsor can be predicated upon past ownership of the plan sponsor, is important to the effective administration of Chapter IV of ERISA governing liability to the PBGC for underfunded pension plans. For all the reasons stated in this petition, East Dayton, Roscommon Financial, Roscommon Reality, Advance Foundry, Dayton Casting and Individual Petitioners request that this case be heard.

Respectfully submitted,

CHARLES J. FARUKI *
PAUL L. HORSTMAN
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
(513) 227-3705
Attorneys for Petitioners

* Counsel of Record